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Constitutional Law - due Process - North Dakota Attachment Procedure Held Unconstitutional

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RECENT CASES

CONSTITUTIONAL LAW—DUE PROCESS—NORTH DAKOTA ATTACHMENT PROCEDURE HELD UNCONSTITUTIONAL

Plaintiffs had purchased a mobile home under a retail installment contract and security agreement from defendant mobile home company. According to the agreement, the mobile home company and subsequent assignees were to retain title. The company then assigned the retail contract and security agreement to defendant, Western State Bank of Devils Lake, North Dakota, which took with recourse. A second security agreement was taken by the bank covering the mobile home and plaintiffs' automobile. Plaintiffs, husband and wife, resided in the mobile home until they fell behind on their installment payments,[1] Western then commenced an attachment action against the plaintiffs and also instituted on action for recovery of the debt.[2] Upon issuance of the warrant of attachment by the clerk of court, the county sheriff[3] seized plaintiffs' mobile home and automobile.[4] Thereafter plaintiffs brought an action against defendants in United States District Court alleg-

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1. Plaintiffs alleged that the delinquency was due to "tremendous fuel bills" incurred as a result of defects in the home, which required them to dedicate money to heating expenses that would otherwise have been used for payments on the mobile home. Guzman v. Western State Bank, 381 F. Supp. 1262, 1264 n.1 (1974), *rev'd* 516 F.2d 125 (8th Cir. 1975).

2. N.D. CENT. CODE Ch. 32-08 (1960), *as amended*, (1973 Supp.) sets forth the procedures for attachment. § 32-08-05 states:

> At the time of applying for the warrant of attachment, the plaintiff shall file in the office of the clerk of court of the court in which the action is commenced:
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> 1. A verified complaint setting forth a proper cause of action for attachment in favor of the plaintiff and against the defendant;
> 2. An affidavit setting forth in substantially the language of the statute one or more of the grounds of attachment enumerated in section 32-08-01, if the claim upon which the action is commenced is due, and, if such claim is not due, one or more of the grounds enumerated in subsections 3, 4, 6, and 7 of that section; and
> 3. An undertaking in accordance with section 32-08-06.

All of these procedures were followed in this case. 381 F. Supp. at 1264.

3. In addition to Western State Bank, other defendants named in this action included the country sheriff, the president and the vice president of the bank, all three named individually and in their official capacities; and the owner of the mobile home company. Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975).

4. Plaintiffs were not notified of the proceeding and neither of them were at home at the time the sheriff and the vice president arrived to take the mobile home and automobile. Plaintiff's wife subsequently arrived on the scene in response to a call from the sheriff. After her unsuccessful attempt to dissuade the sheriff from seizing the mobile home, some of the men accompanying the sheriff prepared to take the trailer away, first removing the stripping from around the sides of the home. Because the wheels of the trainer were frozen in the ground, the removal process was completed only after four and one-half hours of effort, with the combined force of a truck and a tractor. *Id.*

ing that in authorizing seizure without prior notice and hearing, the North Dakota statute did not afford them due process of law as required by the fourteenth amendment to the Constitution. The District Court held that plaintiffs were not deprived of any right, privilege or immunity secured by the Constitution because the interests of the debtor are sufficiently protected by the statute even though the law did not require prior notice and hearing.[5] Plaintiffs appealed the decision to the United States Court of Appeals for the Eighth Circuit, which reversed the District Court decision and held that the impact depriving plaintiffs of their sole place of residence, absent assertions by the creditor that his interest in the property might otherwise be defeated by plaintiffs' concealment, disposition or destruction of the property and absent meaningful judicial supervision, constituted a denial of due process of law under the fourteenth amendment. *Guzman v. Western State Bank of Devils Lake* 516 F.2d 125 (1975).

When the attachment remedy was transplanted to America, its scope was statutorily broadened to allow creditors to utilize the process against local defendants, even when they could not be served personally.[6] In North Dakota, a warrant of attachment will issue only in connection with an action on the debt,[7] and cannot exist independently of such an action.[8] Under the law, personal

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5. 381 F. Supp. 1262.

6. The present-day action of attachment is a product of the customs of London of the 15th Century. Originally, the remedy was available only for use against non-residents, or against residents who had absconded. The action of attachment in the United States is purely statutory. For a detailed account of the history of attachment, garnishment, and related creditor remedies see Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399 (1972-73); Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973).

7. N.D. CENT. CODE § 32-08-01 (Supp. 1973) allows for the attachment of the property of the defendant in the following cases:

1. When the defendant is not a resident of this state or is a foreign corporation;
2. When the defendant has absconded or concealed himself;
3. When the defendant has removed or is about to remove his property, or a material part thereof, from this state, not leaving enough therein for payment of his debts;
4. When the defendant has sold, assigned, transferred, secreted, or otherwise disposed of, or is about to sell, assign, transfer, secrete, or otherwise dispose of his property, with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts;
5. When the defendant is about to remove his residence from the county where he resides with the intention of permanently changing same, and fails or neglects on demand to give security for the debt upon which the action is commenced;
6. When the debt upon which the action is commenced was incurred for property obtained under false pretenses;
7. When the defendant is about to remove his property or a material part thereof from the state with the intent or to the effect of cheating or defrauding his creditors or hindering or delaying them in the collection of their debts;
8. In an action to recover purchase money for personal property sold to the defendant, an attachment may be issued and levied upon such property; and
9. In any action brought against the owner of any motor vehicle for damages alleged to have been caused by the negligence of such owner or his duly authorized agent, the motor vehicle alleged to have been driven, occupied, or owned by a negligent driver or owner thereof, at the time of the accident, may be attached.

8. The North Dakota attachment procedure requires that there be an action for the

service must be made on the debtor within sixty days of issuance of the warrant.[9]

The first major case in the United States to deny the prejudgment attachment of a defendent's property under the due process clause of the Constitution was *Sniadach v. Family Finance Corp.*[10] In *Sniadach* the Supreme Court held the prejudgment garnishment statute of Wisconsin unconstitutional as violative of due process guarantees. There, a small loan company suing on a note owned by defendent, utilized the Wisconsin garnishment statute[11] to require defendent's employer to hold the non-exempt portion of her wages pending a decision as to the creditor's claim on the debt. Pursuant to Wisconsin law,[12] a summons was issued at the request of creditor's lawyer, who then served the summons on the debtor's employer. The non-exempt portion of the wages were then retained by the employer, pending the outcome of the main suit, without any opportunity on the part of the debtor to be heard.

The Court in *Sniadach* emphasized the impact of the *ex parte* proceedings on the employee and, found that she was deprived of a major portion of her wages "without any opportunity to be heard and to tender any defense she may have. . . ."[13] Justice Douglas pointed out that such a procedure may "drive a wage earning family to the wall."[14] The ramifications of the holding in *Sniadach* were initially unclear because the case dealt specifically with wages, "a specialized type of property presenting distinct problems in our economic system."[15]

In attempting to deal with the question left unanswered in *Sniadach* as to precisely what type of property was to be included within the scope of the holding, some courts ruled that only wages were to be included, whereas others expanded the ruling to include other property, such as that seized under attachment statutes.[16]

Three years later, the Supreme Court addressed itself to the

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collection of money in connection with an attachment. *See* Gans v. Beasley, 4 N.D. 140, 59 N.W. 714 (1894).

9. N.D. CENT. CODE § 32-08-03 (1960) provides that: "[A]n action shall be deemed commenced when the summons is issued, but personal service of such summons must be made or publication thereof commenced within sixty days after the issuance of the warrant of attachment."

10. 395 U.S. 337 (1969).

11. Garnishment differs from attachment in that attachment is a procedure exercised over the property of a debtor who is himself in possession of the property, whereas garnishment is exercised over the property of the debtor which is in the hands of a third party, or garnishee.

12. WIS. STAT. ANN. § 267 (1965).

13. 395 U.S. 337, 339.

14. *Id.* at 341-42.

15. *Id.* at 340.

16. For a discussion on the ramifications of the *Sniadach* ruling, see Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U. L. REV. 158 (1970).

question and expanded its holding in *Sniadach* to include other property seized under state attachment statutes. *Fuentes v. Shevin*[17] dealt with the replevin statutes of Florida and Pennsylvania, where plaintiffs had bought household items[18] on installment payment plans, the items themselves constituting collateral on the debt.

The Court in *Fuentes* minimized the distinctions between the deprivation of property considered "necessary" and a deprivation of property of lesser importance saying:

> [If] the root principle of procedural due process is to be applied with objectivity, it can not rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else.[19]

However, the Court did not totally ignore the impact of certain deprivations. The Court said:

> While the length and consequent severity of a deprivation may be another factor to weigh in determing the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.[20]

The Court further held that the fact that the debtor could post a bond and thereby regain possession of the attached property was not an adequate substitute for a prior hearing. As the Court stated:

> When officials . . . seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property, whether or not he has the funds, the knowledge, and the time to take advantage of the recovery provision.[21]

The possibility of a wrongful issuance of the writ, the Court found, was not sufficiently guarded against by the requirements that the creditor post a bond, together with conclusory allegations of ownership, or by the possibility that the creditor would be subject to liability in an action for damages if the writ were improvidently issued. "[T]hose requirements are hardly a substitute for a prior hearing, for they test no more than the applicant's own belief in his rights."[22]

According to *Fuentes*, in order to sustain the constitutionality of any taking there must be notice and a hearing at a "meaning-

17. 407 U.S. 67 (1972).
18. The items involved included a stove, phonograph, a bed, a table and other household goods. *Id.* at 70-71.
19. *Id.* at 90.
20. *Id.* at 86.
21. *Id.* at 85.
22. *Id.* at 83. The Court noted that such requirements may not even test that much, for "if an applicant for the writ knows that he is dealing with an uneducated, uninformed

ful time and in a meaningful manner."[23] The Court stated that notice and a hearing "must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing . . . can undo the fact that the arbitrary taking . . . has already occurred."[24]

However, *Fuentes* left unanswered the question of what procedure the required hearing should follow. The Court did say that "[t]he nature and form of such prior hearing . . . are legitimately open to many potential variations and are a subject . . . for legislation and not adjudication."[25] The *Fuentes* decision was unquestionably a controversial one, and it prompted the reassessment of the attachment laws of several states.[26]

The broad holding in *Fuentes* was substantially limited less than two years later in *Mitchell v. W. T. Grant Co.*,[27] wherein in the Supreme Court upheld the constitutionality of the Louisiana sequestration statute.[28] In *Mitchell*, petitioner sought to invalidate the Louisiana attachment statute.[29] Pursuant thereto, the sheriff had taken several household items[30] bought under an installment payment contract on a writ issued by the parish judge pending the outcome of an action to recover the value of the debt. Under the installment contract, and in accordance with state law, the creditor was to retain a vendor's lien on the property until such time as the purchaser had paid the entire debt.

The Court in *Mitchell* did not expressly overrule the *Fuentes* decision. However, it is apparent that insofar as it limited the requirement of prior notice and hearing before any taking, *Fuentes* was indeed restricted.[31] The majority in *Mitchell*[32] reasoned that

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consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged, and the applicant may feel that he can act with impunity." *Id.* at 83, n.13.

23. *Id.* at 80 *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

24. 407 U.S. 67, 81-82.

25. *Id.* at 96-97.

26. *See, e.g.*, Turner v. Colonial Finance Corp., 467 F.2d 202 (5th Cir. 1972); Sena v. Montoya, 346 F. Supp. 5 (D.C.N.M. 1972); Inter City Motor Sales & Szymanski, 42 Mich. App. 112, 201 N.W.2d 378 (1972). *See also*, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973).

27. 416 U.S. 600 (1974).

28. The Louisiana sequestration statute provides that the sheriff is to take control over the property in question, pending judicial action, and is similar to the attachment statutes of other jurisdictions. *Id.*

29. LA. CODE CIV. PRO. ANN. arts. 3501, 3574 (West 1961).

30. The items sequestered included a refrigerator, range, stereo, and washing machine. Mitchell v. W. T. Grant Co., 416 U.S. 600, 601 (1974).

31. Justice Powell, in his concurring opinion, indicated that in this respect, "I think it fair to say that the Fuentes opinion is overruled." *Id.* at 623. Justice Stewart, in his dissenting opinion, said, "[T]his case is constitutionally indistinguishable from *Fuentes v. Shevin*, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent." *Id.* at 634.

32. The majority of the Court in *Mitchell* consisted of the Justices who had dissented in Fuentes v. Shevin, 407 U.S. 67, 68 (1972), in addition to Justices Powell and Rehnquist, who did not participate in the *Fuentes* decision. Mitchell v. W. T. Grant Co., 416 U.S. 600, 635-36, n.8 (1974).

the due process requirements delineated in *Fuentes* could still be met by "procedural safeguards" that surpass those of the Florida and Pennsylvania statutes struck down in *Fuentes*. *Mitchell* held that the Louisiana statute was neither unconstitutional on its face nor as applied, and was distinguishable from *Fuentes* for several reasons.

First, it was found in *Mitchell*, as in *Fuentes*, that the debtor undeniably owned the property in question; however, *Mitchell* recognized that the creditor has an interest in the property as well, until the debt is paid. The Court maintained that "[t]he question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized . . . [,]"[33] but rather, one of determining the relative interests of the creditor and the debtor in the same property. The Court stated that it is necessary to balance the interests of the creditor and debtor. On the one hand, a court must consider the interest of the creditor to insure that his security interest in the property will not be diminished or destroyed by acts of the debtor. On the other hand, a court must determine the rights of the debtor to protect his right to continued use of the property.[34] According to *Mitchell*, the protection to be afforded the creditor includes guarding against "the risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller."[35]

Second, *Mitchell* found that while the statutes considered in *Fuentes* allowed a clerk of court to issue warrants of attachment, the writ of sequestration involved in *Mitchell* required issuance by a judge.[36] The Court concluded, therefore, that "Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end."[37]

Third, the Court in *Mitchell* determined that "[d]ifferent from the Florida and Pennsylvania systems, bare, conclusory claims of

33. *Id.* at 606, n.5. This would be the case in the garnishment of wages, as expressed in *Sniadach*.

34. The Court in *Mitchell* asserted that the interest of the debtor may never exceed that of the creditor, until such time as the debt is paid in full, for the interest of the creditor "was measured by the unpaid balance of the purchase price. The monetary value of that interest in the property diminished as payments were made, but the value of the property as security also steadily diminished over time as it was put to its intended use by the purchaser." *Id.* at 604.

35. *Id.* at 608-09. The *Mitchell* Court noted that "[a]n important factor . . . is that under Louisiana law, the seller's vendor's lien expires if the buyer transfers possession. *Id.* at 609. The expiration of the lien was another factor weighed in the "balancing test."

36. *Id.* at 616. Louisiana law required that a judge issue the writ in Orleans County only; all other Louisiana parishes authorized court clerks to perform the function. But the validity of the procedure outside Orleans Parish was not at issue in *Mitchell*. *Id.* at 606, n.3, *quoting* LA. STAT. ANN. arts. 281, 282 (1960).

37. *Id.* at 616.

ownership or lien will not suffice under the Louisiana statute."[38] Instead, the statute in question in *Mitchell* required that a writ be issued "only when the nature of the claim, and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts."[39] Furthermore, according to the Court, these facts turn on the

> existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof. . . . The nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge.[40]

Fourth, the *Mitchell* Court maintained that the rights of the debtor were sufficiently protected against a wrongful taking by the creditor. The insurance against the possibility of an unfounded claim under the Louisiana Statute "is buttressed by the provision that should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits.' "[41] Moreover, the Court found that the rights of the debtor were sufficiently protected because the statute entitles the debtor immediately to seek dissolution of the writ unless the creditor sustains his burden of proof in showing that the writ was not improvidently issued. Any failure by the creditor to support this burden necessitates the dissolution of the writ.[42] This right to an early opportunity to put the creditor to his proof in *Mitchell* was distinguished from the statutory provisions involved in *Fuentes,* which the Court found did not allow for an early opportunity to be heard.[43] Even if the debtor does not avail himself of this remedy, the Court determined that the debtor "may also regain possession by filing his own bond to protect the creditor against interim damages to him should he ultimately win his case. . . . "[44]

On the basis of *Mitchell,* the District Court in *Guzman* upheld

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38. *Id.*

39. *Id. quoting* LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

40. *Id.* at 609-10. The dissent in *Mitchell* insisted that this contention was not distinguishable from the one advanced in *Fuentes. Id.* at 633. "The issues decisive of the ultimate rights to continued possession, of course, may be quite simple . . . But it certainly cannot undercut the right to a prior hearing of some kind." *Fuentes v. Shevin,* 407 U.S. 67, 87, n.18 (1972).

41. *Id.* at 617 *quoting* LA. CODE CIV. PRO. ANN. art. 3506.

42. *Id.*

43. The *Fuentes* court, in reviewing the Florida and Pennsylvania statutes involved found that the debtor in Florida would "eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession . . . . Pennsylvania law does not require that there *ever* be opportunity for a hearing. . . ." Fuentes v. Shevin, 408 U.S. 67, 75-77 (1972).

44. Mitchell v. W. T. Grant Co., 416 U.S. 600, 607 (1974). This conflicts with the *Fuentes* statements that the "deterrent effect of a bond requirement is [no replacement for the right to a prior hearing]. The possibility of regaining possession by a debtor's counter bond still deprives him of property. Fuentes v. Shevin, 407 U.S. 67, 83, 85 (1972).

the constitutionality of the North Dakota attachment statute.[45] In balancing the interests of the creditor and the debtor in accordance with the *Mitchell* standard, the court found that the interest of the debtor in the property was sufficiently protected, and thus the constitutionality of the statute was upheld. As the Court noted, measures protecting the debtor included his ability to regain possession of the property either by payment of a bond, in which case the warrant is immediately dissolved, or by his right to an early hearing for dissolution of the writ if it appears to have been irregularly issued.[46] Regarding the possibility that a warrant may be wrongfully issued, the District Court stated that such a risk is minimized by requirements "limiting the attachment remedy to nine specific grounds,[47] considered together with the requirement of strict compliance mandated by . . . North Dakota courts. . . ."[48]

In the opinion of the District Court, the fact that the issuance of the warrant of attachment is authorized by a court clerk rather than a judge, was not a constitutional deficiency because the creditor must show probable cause before issuance. Further, the plaintiff has early access to the courts to move for discharge of a warrant irregularly issued.[49]

The District Court recognized that the debtors did indeed suffer a hardship as a result of the deprivation of their home, but minimized the importance of the impact on the debtors in weighing the debtor's interest. The District Court stated:

> [T]he question of whether public policy should exempt such a mobile home from the 'harsh' remedy of attachment is a legislative question. . . . [T]o be free from resultant hardships is not one of the rights guaranteed by the Constitution or laws of the United States.[50]

On appeal to the United States Court of Appeals for the Eighth Circuit the case was reversed and remanded.[51] Relying on the holding in *Mitchell*, the Eighth Circuit Court said, "[B]ecause of vital distinctions between the provisions of the Louisiana sequestration law and the North Dakota attachment statute, *Mitchell* dictates that plaintiffs were denied due process of law."[52] The Court

45. Guzman v. Western State Bank, 381 F. Supp. 1262 (1974).
46. N.D. CENT. CODE §§ 32-08-18 to 24 (1960) set forth the procedures required to obtain a discharge of the warrant.
47. *See* N.D. CENT. CODE § 32-08-01 (Supp. 1973).
48. 381 F. Supp. at 1265.
49. *Id.* at 1265.
50. *Id.* at 1267.
51. Also remanded to the District Court was the issue of the liability of the sheriff for his role in the proceedings. The court said, "[W]e are not inclined to hold as a matter of law, on review of the summary judgment proceeding, that quasi-judicial immunity extended to the sheriff. . . . [T]he question . . . should be resolved upon a ventilation of all of the facts bearing on that issue." 516 F.2d 125, 132-33 (1975).
52. *Id.* at 129.

pointed to four areas in which the North Dakota statute failed to accomodate the conflicting interests of the debtor and creditor.

First, the North Dakota statute did not require that the creditor assert the danger that the debtor may conceal or remove the goods from the state, which was, the Court noted, "one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property."[53] This assertion of danger that the debtor may conceal or remove the goods from the state is among the nine possible grounds which the creditor may assert in his affidavit seeking a warrant of attachment in North Dakota.[54]

However, the warrant could still be issued without such an assertion if the creditor relied on any of the other grounds set forth in the statute. Additionally, it was found that "the affidavit of [the] defendant . . . does not aver that the summary attachment was necessary to preserve the property interests of the creditor in the personalty, nor does North Dakota attachment law require such an averment."[55] In distinguishing *Mitchell* the Court of Appeals stated:

> [T]he *Mitchell* opinion suggests that the remedy should be employed to protect a creditor's interest only if there is a danger that those interests will be destroyed or defeated unless such a summary step is taken. . . . If such an emergency situation does not exist, the creditor's interest in the property probably will not be impaired by a short delay to provide notice and hearing to the debtor.[56]

Second, the Court interpreted *Mitchell* as holding that the issuance of the writ by a judge rather than a court clerk is vital. The Court of Appeals noted:

> *Mitchell* mandates that we review the North Dakota attachment law to determine if there is meaningful judicial supervision of the prejudgment attachment process. It is apparent that there is no such supervision.[57]

In the view of the Court of Appeals, the reason for the emphasis in *Mitchell* on the active participation of a judge was to insure

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53. *Id. quoting* Mitchell v. W. T. Grant Co., 416 U.S. 600, 609 (1974).

54. Defendants here relied on N.D. CENT. CODE § 32-08-01(8) (1960) in their affidavit, which the Court of Appeals considered "the most general of the nine grounds listed." Guzman v. Western State Bank, 516 F.2d 125, 129 (8th Cir. 1975).

55. *Id.* at 130.

56. *Id.*

57. *Id.* at 131.

58. *Id.* The Eighth Circuit Court stated:
> We recognize that in the most recent decision by the Supreme Court in this area of the law, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, ——U.S.—— (1975), [decided January 22, 1975], there are suggestions in the concurring

that judicial discretion would be exercised whenever necessary and to minimize the likelihood of an improper issuance.[58]

Third, the North Dakota statute allows the debtor to seek an immediate dissolution of the warrant only after posting a bond prior to a post seizure hearing,[59] whereas the Louisianna statute did not have such a bond requirement. This prerequisite, the Court said,

> places a considerable impediment on any debtor who seeks to contest the attachment of any item of substantial value, and to the extent that any debtor is unable to meet the bond requirement in order to obtain a discharge hearing, the goal of minimizing the impact on the debtor of a wrongful attachment has been undermined.[60]

Fourth, the Court emphasized the resultant hardship to the debtors as a result of the deprivation of their mobile home. The impact on the debtors should have been one of the factors considered in weighing the relative interests of the parties.[61] The Court stated:

> [H]ere we have more than the inconvenience caused by the deprivation of some household items. . . . In this case we have debtors faced with the catastrophe of losing their home in an *ex parte* procedure by which they are summarily evicted without any opportunity to be heard and to resist the grounds for eviction.[62]

The Court of Appeals took issue with the holding of the District Court that consideration of the impact was a matter for the legislature. Instead, the Court of Appeals stated that the seriousness of the deprivation was "a factor to be weighed in determining if concepts of due process validate specifically the *ex parte* seizure under review."[63]

The law often has the responsibility of balancing the interests between two parties with greatly differing claims. However, the task of reaching a satisfactory compromise in this area of law is especially complex. It is generally the financially weak who

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> and dissenting opinions that some of the justices do not believe that supervision of the *ex parte* proceeding by a *judicial* officer is required. . . . Nevertheless, we are compelled to observe the criterion established by the opinion in *Mitchell* until instructed otherwise by the Court.

Id., n.7.

59. The District Court had construed N.D. CENT. CODE § 32-08-24 (1960) to mean that a bond was not required for dissolution of a writ that had been irregularly issued. Gusman v. Western State Bank, 381 F. Supp. 1262, 1265, n.7 (1974).

60. Guzman v. Western State Bank, 516 F.2d 125, 131 (8th Cir. 1975).

61. *Fuentes* had minimized the consideration of the "impact doctrine" first mentioned in *Sniadach*, because in *Fuentes* it was held that procedural due process was not "limited to the protection of only a few types of property interests." Fuentes v. Shevin, 407 U.S. 67, 89 (1972). *Mitchell*, however, reinstituted the consideration as one of the factors to be weighed in the decision to issue the writ.

62. Guzman v. Western State Bank, 516 F.2d 125, 132 (8th Cir. 1975).

63. *Id.*

find themselves in the position of losing the goods they strenuously endeavored to acquire. We must recognize that these people are often unaware of their rights, and lack the means to insure that they are protected. Yet, if the creditor's remedies are excessively restricted, we run the risk of depriving creditors of their rights.

WAYNE STENEHJEM

MUNICIPAL CORPORATIONS—GOVERNMENTAL IMMUNITY—POLITICAL SUBDIVISIONS LIABLE FOR NON-DISCRETIONARY TORTIOUS CONDUCT.

Plaintiff brought an action against the Minot Park District for the death of her twelve year old son who drowned in an unfenced, unguarded duck pond. The trial court granted defendant's motion for summary judgment on the basis of governmental immunity. On appeal, the Supreme Court of North Dakota reversed and *held* that the immunity afforded local governmental entities from tort liability would no longer be retained. Therefore, political subdivisions could be, within certain limits, liable for negligence.[1] *Kitto v. Minot Park District,* 224 N.W.2d 795 (N.D. 1974).

Governmental immunity is the protection from liability for tortious conduct afforded local governmental units.[2] Generally, it is agreed that the doctrine originated in a 1788 Kings Bench decision, *Russell v. Men of Devon.*[3] Subsequently, the doctrine in *Russell* was adopted in the United States,[4] and the concept of governmental immunity became the general rule in this country.[5] Although immunity previously was a convenient alternative to imposing burdensome judgments on budding municipalities,[6] this fact does not

1. Judge Johnson, speaking for a unanimous bench, wrote the opinion of the court.

2. Governmental immunity, then, should be distinguished from the concept of sovereign immunity which is the immunity possessed by the state government. It might be more appropriate to term the concept state immunity since sovereignty has other connotations in that sovereignty inheres in the people. *See* State ex. rel. Miller v. Taylor, 22 N.D. 362, 133 N.W. 1046 (1911).

3. 2 T.R. 667, 100 Eng. Rep. 359 (1788). This case, involving a tort action against an unincorporated county, established immunity from liability on two grounds. First, there was no fund out of which a judgment could be satisfied. Secondly, the court thought it better that an individual sustain a loss rather than the public suffer an inconvenience.

4. Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812) *Mower* was dissimilar, however, since unlike Russell it involved a county that was incorporated, could sue and be sued, and had a corporate fund out of which a judgment could be satisfied. Thus, the doctrine was adopted but the reasoning was not.

5. W. PROSSER, LAW OF TORTS 970-87 (4th ed. 1971).

6. *See* Vail v. Town of Armenia, 4 N.D. 239, 59 N.W. 1092 (1894). For example, in